231965

DOUGLAS M. CANTER
JOHN M. CUTLER, Jr.
ANDREW P. GOLDSTEIN
GARRY S. GROSSMAN
JEFFREY S. JACOBOVITZ
STEVEN J. KALISH
SUSAN J. KING
CHANNING D. STROTHER, Jr.

CHIA-CHEN SALLY CHU*
LISA S. NOVINS**

* Admitted to NY Bar
**Admitted to MD Bar

LAW OFFICES
McCARTHY, SWEENEY & HARKAWAY, P.C.
SUITE 700
1825 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 775-5560

FACSIMILE
(202) 775-5574

E-MAIL
MSH@MSHPC.COM

WEBSITE
HTTP://WWW.MSHPC.COM

March 5, 2012

PUBLIC VERSION

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Docket No. 42119
North America Freight Car Association v. Union Pacific Railroad Company

Dear Ms. Brown:

Enclosed for filing is a signed original and 10 copies of a PublicVersion of Rebuttal Argument and Evidence of North America Freight Car Association in the above-referenced case.

Respectfully submitted,

Andrew P. Goldstein
North America Freight Car Association

231965 ORIGINAL

PUBLIC VERSION

MAR 5 2012

BEFORE THE

SURFACE TRANSPORTATON BOARD

DOCKET NO. 42119

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

UNION PACIFIC RAILROAD COMPANY

REBUTTAL ARGUMENT AND EVIDENCE OF NORTH AMERICA FREIGHT CAR ASSOCIATION

Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, N.W., Suite 700
Washington, DC 20006
(202) 775-5560

Attorneys for
North America Freight Car Association

Dated: March 5, 2012

TABLE OF CONTENTS

PUBLIC VERSION

BEFORE THE

SURFACE TRANSPORTATON BOARD

DOCKET NO. 42119

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

UNION PACIFIC RAILROAD COMPANY

REBUTTAL ARGUMENT AND EVIDENCE OF
NORTH AMERICA FREIGHT CAR ASSOCIATION

I. INTRODUCTION

The list of defects reflected in UP's tariff Item 200-B, from the perspective of the law, the facts, and sound policy, is a long one, as shown in NAFCA's Opening Statement and as amplified below. However, it is important to address at the outset a particularly pernicious claim by UP: that Item 200-B should be viewed favorably as a successful, necessary, and therefore reasonable safety measure.

This is not the first case in which a railroad's effort to wrap itself in the flag of safety has been challenged as another attempt to force shippers to shoulder risks traditionally borne, as required by law, by the railroads themselves. NAFCA will show that UP is engaged in just such an effort, and that the means selected by UP constitute impermissible overreaching, imposing what amounts to strict liability on shippers who may be blameless, or may, at most, bear only a share of fault, along with UP.

Means aside, the very objective that UP claims to be pursuing – safer rail operations, and in particular, safer operations at those UP rail yards using retarders to reduce the speed of cars during sorting – is suspect as the objective of Item 200-B.

Under shelter of its safety rubric, UP contends that Item 200-B, and its predecessor, Item 200-A, have reduced "safety hazards posed by lading residue." See UP Reply at 22 (section of Reply entitled, "THE SUCCESS OF ITEM 200-B AT REDUCING THE SAFETY HAZARDS POSED BY LADING RESIDUE") and Reply at 11 ("UP believes its efforts to prevent over-speed incidents, including its establishment of Item 200-B, have played an important role in reducing the number of incidents in the yards.")

UP asserts that the "most common and disruptive effects" of lading residue on car exteriors occur at classification yards, where hump retarders may become "fouled" by product residue on wheels, resulting in "overspeed" cars. UP Reply at 9. Yet, the facts show that UP's claim of safety improvement at classification yards due to Item 200-A and B is baseless. According to Federal Railroad Administration ("FRA") data, the reportable retarder failure rate **increased by more than 50 percent** (from 11 incidents to 17) **in the four years since Items 200-A and B took effect versus the four years immediately preceding.** See NAFCA Counsel's Exhibit No. 1 hereto.

As discussed further below, UP's Reply is bereft of any data to support its assertion that Item 200-B[1] has improved safety on UP. UP relies almost entirely on anecdotal evidence consisting of references to a limited number of incidents where residue on car wheels allegedly fouled UP's yards and retarders and on conjecture as to what "might have happened" as a result of an overspeed car exiting a retarder.

---

[1] Whenever reference is made to Item 200-B, it should be deemed to also include Item 200-A, unless the context suggests a different construction.

UP pays lip service (Reply at 3) to "balancing" responsibilities of carriers and shippers ("Item 200-B helps prevent accidents from occurring by providing an incentive for both shippers and receivers ... to work cooperatively"). However, it is clear that its main purpose is to place the blame for car exterior residue on shippers generally (ignoring any role UP's own misfeasance or nonfeasance may have played), and in particular on the shipper at whose facility the car was last loaded (ignoring events prior to and subsequent to that loading event). See, e.g., UP Reply at 15. ("When product residue is found on the exterior of a railcar, it is always the result of a problem that occurred during loading or unloading."); Reply at 25 ("UP's customers have control over whether product residue even becomes a problem, because they are the ones that load or unload the cars...."). But UP's own failures, such as the failure to inspect both empty and loaded car exteriors for residue, moving cars over spillages in its own yards, and its failure to inspect retarders until *after* there has been an overspeed retarder incident, also should be put on the scales and balanced, as should other occurrences in transit.

Item 200-B tilts the balance heavily in favor of UP and against its customers by creating a new "obligation" for shippers to tender "safe" cars to UP for transportation, and by providing that UP's "acceptance of a rail car that is later determined to be leaking or to have lading residue on its exterior will in no way relieve the consignor, consignee, or agent of its obligations herein, and shall not constitute a waiver by UP of the consignor's consignee's or agent's obligations to tender rail cars suitable for safe movement." UP thus sets the stage for arguing, whenever it asserts a claim against a shipper for damages allegedly related to car residue, that its own failure to fully FRA rules may not be raised as a defense against it.

NAFCA and its members endorse railroad safety as much as does any railroad, including UP. As UP admits, most of the loading facilities operated by NAFCA members are operated

with a view toward car safety. Reply at 19. UP identifies a limited group of commodities – no more than a half dozen – that it sees as accounting most frequently for objectionable product residue on car wheels. Oils, tallow and greases are identified by UP as the main causes of exterior residue. Ronci V.S. at 7. If UP could intensify its pre-departure inspections at facilities shipping this limited group of commodities, and at the particular origins which UP apparently regards as being frequent sources of product residue, it might eliminate most retarder problems.

Although UP says it "[tries] to alert the train crew to the problem" spots (Ronci V.S. at 19), there is no evidence that it does so. No copies of such instructions to train crews are provided by UP. In fact, there is no credible evidence offered by UP to show that it actually performs the full pre-departure inspection of cars mandated by FRA rules. UP keeps no records of alleged inspections, and it offers largely undocumented claims and generalizations regarding the potential problems that might be caused by lading residue on car wheels, admitting that there have been no incidents of personal injuries due to lading residue on car safety appliances. FRA edicts require cars to be inspected from both sides of a train, but UP makes no specific claim that it does so. See Counsel's Rebuttal Exhibit 2.

Evidently, UP decided that it is easier and cheaper to use Item 200-B to shift costs, burdens and risks to shippers rather than taking more preventive measures with its own equipment and facilities. It is surely no coincidence that Item 200-B also limits the defenses shippers would have if UP sought to recover damages under tort law in those relatively few instances where overspeed retarder exits cause property damage. UP acknowledges that there can be legitimate factual disputes involving damage allegedly caused by "dirty" cars. Reply at 43. Were UP to bring suit against a shipper in the absence of Item 200-B, the shipper could offer a defense of contributory or proportional negligence by UP, offering in support of that defense evidence that

UP had accepted cars as fully safe, thereby negating any claim by UP that the shipper had tendered a car unsuitable for transportation. For UP to prevail in such a tort case, UP would have to establish through probative evidence that a car it had accepted for transportation and later claimed to have fouled a retarder did so due solely to improper loading by the most recent shipper, with no contribution to causation by any other party or factor, such as a leaking car that UP failed to spot or remediate as early as it might have. Like shippers who must pursue civil remedies against carriers for such things as cargo loss and damage claims, carriers have recourse to all applicable legal remedies. It is neither unlawful nor unreasonable to require railroads like UP to pursue such remedies when their property is damaged. What is unreasonable is for UP to use its ability to issue tariffs to replace such civil remedies with strict shipper liability, and with no safe harbor, regardless of shipper fault and regardless of the responsibility of UP and other causative factors.

II. APPLICABLE LEGAL STANDARD

UP's factual arguments are unavailing, as discussed above and as detailed further below. However, it is also important to reiterate NAFCA's point that this case arises in the context of increasing efforts by railroads to shift risks, costs and burdens to their customers, and that the applicable legal standard is affected by that fact. UP ignores these considerations.

Shippers have observed for years railroad tariff changes that reduce railroad operating costs, risks and burdens by the simple expedient of forcing shippers to assume those risks, burdens and costs. These burden shifts are not accompanied by reductions in the line haul rates that formerly covered services the railroads no longer provide. On the contrary, railroads are raising their rates even as they reduce service quality by forcing shippers to do more.

To the extent the Board has experienced an increase in unreasonable practice cases, this phenomenon is largely responsible. Shippers are being forced to provide cars the railroads formerly supplied, and acquire more cars than should be necessary because of erratic railroad service. Railroads have imposed fuel surcharges that exceed fuel cost increases, they are asking shippers to treat coal to reduce dust, they seek to immunize themselves against the possibility of heavy accumulations of snow or ice in transit, requiring underloading or removal by shippers. And UP and other railroads want to be indemnified against liability in the event hazardous materials are released, whether the shipper was at fault or not, so long as the railroad was not solely at fault. There must be regulatory recourse and reasonable limits on the ability of railroads to use tariffs to avoid otherwise applicable legal obligations. Railroads also regularly demand that shippers indemnify railroads against the railroads' own negligence in industrial sidetrack agreements.

Given the benefits of the foregoing practices to the railroads themselves and the success they have enjoyed, it is no surprise that railroads keep finding new ways to shift costs, burdens and risks to others, including shippers and car providers like NAFCA's members. With the increasing market power of the Class I railroads, an unreasonable practice complaint before the STB is often the only way to resist this trend. It is also not surprising that UP would argue for a legal standard that defines the reasonableness of railroad practices as broadly as possible. However, its arguments are wide of the mark.

At page 35 of its Reply, UP argues that STB unreasonable practice jurisprudence starts from the premise that any rule a railroad adopts is "presumptively right and reasonable," citing *Platt v. LeCocq*, 158 F. 723 (8th Circuit 1907). Not only is UP's authority from more than 90 years before the STB even existed, in a case arising under South Dakota law, but the Board re-

jected precisely this argument when BNSF made it in Docket No. 42060 (Sub- No. 1), *NAFCA v. BNSF*, decision served January 26, 2007, petition for review denied, *NAFCA v. STB*, 529 F.2d 1166 (D.C. Cir. 2008). The Board stated in its Decision:

> BNSF argues that the 2001 [tariff] Charges should be considered presumptively valid and that Complainants therefore bear a higher standard of persuasion, to present "compelling" evidence. However, BNSF does not provide any authority for this proposition.

Slip opinion at 5, footnote omitted.[2]

Consistent with its flawed premise, UP posits a standard of reasonableness under 49 U.S.C. § 10702 that would give railroads a free hand to impose any requirements they like, so long as the railroad is addressing a "reasonable objective" and has chosen a "reasonable solution." UP Reply at 35. UP evidently believes that unreasonable features of challenged tariffs cannot be disturbed in an unreasonable practice proceeding if the railroad defendant is pursuing a reasonable goal. See also Reply at 48 ("tariffs are not required to be perfect; they must be reasonable").

In this proceeding, NAFCA challenges the reasonableness of the fundamental premise of UP's tariff, which is that debris on railcars is a problem for which shippers bear nearly exclusive responsibility. However, UP's contention that NAFCA's complaint must be rejected if UP's objective is reasonable is simply not the law. UP is positing a test so favorable to railroads as to limit STB unreasonable practice jurisdiction to cases of irrational conduct by railroads. The decision cited by UP (Reply at 35) for the proposition that the Board must not "micro-manage the railroad's decision-making" is STB FD 35305, *Arkansas Electric Coop Corp. – Petition for Declaratory Order* (decision served March 3, 2011). That decision does not support UP. Indeed,

---

[2] While the Board went on to hold that NAFCA had the burden of proof in that decision, distinguishing earlier precedent involving radioactive materials, that precedent is highly relevant to this case, as discussed below.

the page to which UP cites, page 14, explicitly rejects its standard. The Board there finds BNSF's objective of dealing with coal dust impacts reasonable, but it proceeds to find the tariff provisions to be an unreasonable practice due to a long list of objectionable features.

As the Board explains at the beginning of its Conclusion:

> While the goal of maximizing the release of coal dust during rail transport is a reasonable objective for railroads and coal shippers to pursue, the challenged tariff in this case simply creates too much uncertainty to be deemed a reasonable practice. Under the challenged tariff, the railroads would accept railcars loaded with coal and then inform coal shippers at a later date whether and to what extent coal was released during transport.

Arkansas Electric Coop. at 14, and the Board's discussion goes on to identify other unreasonable features of the BNSF tariff, some of which parallel features of the UP tariff challenged here.

Not only does applicable precedent require more of challenged railroad tariff provisions than that they be adopted in pursuit of a reasonable objective, such as safety, but a higher legal standard is clearly necessary to prevent abuses. If the Board did not have the ability to correct unreasonable practices claimed necessary to achieve arguably reasonable goals, a railroad could sanitize plainly abusive practices through the simple expedient of claiming that its goal is reasonable, and that its tariff is also reasonable because it has reasonable features along with the challenged features. Even if the former outnumber the latter, the Board can and should provide relief from the unreasonable practices in a challenged tariff.

Under UP's theory of the law, the Board would have no ability to order limits on railroad fuel surcharges, because it is reasonable for railroads to seek to recover fuel costs. But see STB Ex Parte No. 661, Rail Fuel Surcharges, served January 26, 2007, and the Board's July 25, 2008 decision in *Dairyland Power Coop v. UP*. UP's theory would let a railroad penalize shippers and

car owners even if they are blameless, so long as the railroad was arguably pursuing a generally meritorious goal, such as safety or efficiency.

In this case, as discussed further below, UP contends that no "safe harbor" is needed notwithstanding the Board's finding that BNSF's coal dust rule was unreasonable without such a clear statement of where and when penalties may be imposed. However, UP argues that shippers may be required to tender cars in a clean and safe condition (though not "white-glove test" clean), and that UP may impose penalties even if this amounts to imposing liability on shippers for UP's own failings, or those of previous shippers, or other railroads or third parties who may have disturbed cars or compartment covers in transit. As a matter of law, strict liability and safe harbors are opposites.

UP argues that Item 200-B is consistent with other railroads' tariff provisions on over-loaded cars. Reply at 41. However, the UP tariff included in Counsel's Exhibit K provides for "safe harbor" tolerances of 5,000 lbs. in 263,000 lb. cars, and 2,000 lbs. in other cars. Item 200-B has no tolerances.

UP attempts to supplement its erroneous legal standard of presumptive reasonableness with an erroneous analysis of the burden of proof. Allegations that NAFCA has failed to prove this or that aspect of Item 200-B to be unreasonable become a variation on UP's theme that reasonableness should be presumed. As a matter of law and as a matter of policy, UP is wrong.

In its Opening Statement, NAFCA cited the ICC's *Radioactive Materials* cases, and particularly *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1980), for the proposition that the ICC may defer to other agencies (there the NRC and DOT, here the FRA) as to whether safety measures are reasonably required and "whether any safety measure will likely produce safety benefits commensurate with its costs." At page 49 of its Reply, UP describes NAFCA's position

as "not entirely clear," but *Consolidated Rail Corp.* upheld a decision by the ICC finding that defendant railroads in that case had the burden of proving the reasonableness of their tariffs where the result was to impose safety standards on shippers that had no basis in NRC or DOT safety requirements. The analogy to this case, which involves FRA safety requirements, is clear.

Here, too, another agency has extensive jurisdiction over rail safety, a railroad seeks to impose standards over and above those called for by FRA, and the railroad argues that the burden of proving unreasonableness is on those challenging its tariffs. The D.C. Circuit rejected that argument in *Consolidated Rail Corp.*, and also rejected railroad arguments to the effect that "the Commission lacks authority to second-guess the railroads 'rational judgment' on an 'operational' issue." 646 F.2d at 646. See also 646 F.2d at 648, where the court explained:

> The mere assertion of safety as a justification for a particular expenditure by a railroad company is not conclusive upon the Commission's judgment of the reasonableness of that expenditure or the tariff based upon it. The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost, and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit.

These standards should apply regardless of whether the railroad is imposing tariff charges for alleged safety benefits, or attempting through tariffs to force shippers to shoulder the challenged costs, burdens and risks.

More recently, in *Arizona Electric Coop.*, the STB had occasion to revisit this issue. BNSF argued that the focus on the Board's inquiry should not be on what the Board believes is the most reasonable practice, but simply whether BNSF's tariff was a reasonable response to the coal dust issue. *Arizona Electric Coop.*, slip opinion at 4-5. In other words, like UP here, BNSF argued that it should get the benefit of any doubt, but the Board disagreed.

FRA regulations impose safety obligations on railroads, shippers and car suppliers, and where a railroad seeks to shift its obligations to others, there must be no presumption that this is reasonable. Moreover, state law, including tort law, provides a well-established means of allocating responsibility if mishaps occur. It is untenable for UP to argue that it has a free hand to reallocate those burdens in a way that favors UP and disfavors others, regardless of fault, and that the burden of challenging alleged safety benefits is entirely on those who challenge UP's reallocations.

Applicable precedent makes clear that there are limits on a railroad's ability to relieve itself of safety and service obligations by imposing on others the responsibility the railroad has traditionally borne. Railroads continue to test these limits in tariffs that shift burdens, costs and risks to shippers, but this is not a trend that should be encouraged.

III. UP'S RECITATION OF THE BACKGROUND OF ITEM 200-B IS INACCURATE AND IMPROPER

At pages 4-6 of its Reply, UP sets forth its version of the "Origins of Item 200-B." UP correctly states that the present dispute between NAFCA and UP originated when Item 200-A was published. At that point, NAFCA filed its complaint with the Board, and the parties agreed to attempt a negotiated solution through voluntary discovery, exchanging data and argumentative positions, and to consider requesting Board-supervised mediation. The Board placed its imprimatur on that proposal by decision issued June 8, 2010. Subsequently, the parties requested and received extensions of the period initially allotted by the Board for those purposes and had meetings, telephonic, and written exchanges. However, negotiations did not prove fruitful, and the parties submitted a joint proposal for a procedural schedule, which was approved by the Board. See Decision of September 26, 2011.

UP sets forth its version of the negotiations that took place between the parties in an attempt to resolve their dispute pursuant to the Board's permission. UP states that "NAFCA's most significant concern appeared to be that Item 200-A included an indemnity provision," and that "NAFCA also objected to Item 200-A based on a concern that the provision reflected an attempt by UP to disclaim its responsibility under Federal Railroad Administration ... safety rules to inspect rail cars for unsafe conditions by making the party releasing a loaded or empty railcar 'solely responsible' for insuring that the railcar wheels and safety appliances were 'clean from any commodity residue'."[3] Those were, in fact, concerns of NAFCA, but not the only ones.

UP then asserts that it issued "Item 200-B in an effort to address NAFCA's concerns. In particular, UP removed the indemnity provision.... UP also removed the language stating that shippers and receivers were 'solely responsible,' so there would be no possible question that it fully intended to perform all safety inspections *required by FRA*." (Emphasis ours.)

UP should have protected the confidentiality of dispute resolution communications between itself and NAFCA. *See, e.g.,* 5 U.S.C. § 574(b) ("A party to a dispute resolution proceeding shall not voluntarily disclose ... any dispute resolution communication.") So long as UP has taken us down the path of disclosure, NAFCA has no choice but to correct the record, citing what UP actually asserted during the dispute resolution discussions: that it did not believe that detecting residue on car wheels was required by FRA rules. With respect to wheel inspections, UP argued that FRA rules place a duty on the carrier to inspect wheels for cracks, and that wheel residue inspections are not required. As becomes apparent later in this Rebuttal Statement, that

[3] As authority for the UP language set forth in this paragraph within quotation marks, UP refers to "*Id.*" So far as NAFCA can determine, however, the preceding reference to "*Id.*" is simply Item 200-A. See Reply, fn. 5. The prior citation, Reply, fn. 4, refers to Mr. Ronci's Verified Statement. However, Mr. Ronci was not a party to discussions between NAFCA and UP. Therefore, the language in UP's Reply set forth above within quotation marks appears unsupported.

still appears to be UP's position. Although UP claims that it "instructs" its train crews to inspect wheels for product residue, it provides no copy of any such written instructions.[4]

UP goes on to misstate NAFCA's position during negotiations, referring erroneously to "NAFCA's insistence that, once UP moves a railcar from a customer facility, UP could no longer hold a customer responsible for the presence of lading residue on the railcar's exterior." Reply at 5. That has never been NAFCA's position. We said instead that once UP has accepted a car into transportation without setting it aside for an "unsafe" condition, such as product seepage from a tank car manway or discharge valve, there should be no *presumption* that the shipper is responsible for any product residue *later* found on the wheels. The carrier at that point should have to offer proof that product residue on the wheels was the fault of the shipper, prove the causal connection between the shipper's actions and the mishap, and face any defenses in fact or law available to the shipper.

UP's conclusion is that "if shippers and receivers have a responsibility to remove product residue from the exterior of railcars ... before releasing them to UP, they should not be allowed to avoid those responsibilities simply because UP did not detect the problem immediately or the problem manifested itself only after the car was in transit." Reply at 6. The flaw in this reasoning is that, once the car is accepted into transportation by UP, it cannot be conclusively presumed that the shipper failed to meet its so-called "responsibilities" in the first place. Moreover, the "responsibility" to which UP refers is that created by Item 200-B. No statute or regulation is cited by UP to support the existence of any such "responsibility." To the contrary, as discussed below, the law is clear that the carrier has a duty to furnish a clean car suitable for loading. NAFCA agrees that it is in the best interest of all for car exteriors to be free of product residue,

---

[4] In contrast, see UP Reply, Highly Confidential Counsel Exhibits G, H, and I, _____ _____.

and, as UP freely admits in its reply, most shippers endeavor to tender "clean" cars to UP most of the time. The problem does not arise "simply because UP did not detect the problem immediately"; it arises because UP wants to immunize itself against the possibility that its failure to detect the problem immediately has anything whatsoever to do with liability for any subsequent mishap.

IV. STATE LAW PROVIDES RECOGNIZED REMEDIES FOR NEGLIGENCE BY A RAILROAD, ITS CUSTOMER, OR A COMBINATION OF THE TWO

Item 200-B is unnecessary in light of established state law governing torts. In fact, Item 200-B is an unreasonable effort to override state law by suggesting that UP may not be liable for negligence arising from its acceptance of a car into transportation, even if it can be proven that UP did not perform the type of pre-departure inspection required by FRA rules, or take other steps that could have prevented a retarder-related incident.

It is an established canon of negligence law that common carriers cannot by tariff avoid liability for damages caused by their own negligence. *Union Pacific Railroad Company v. United States*, 292 F.2d 521, 523 (Ct. Cl. 1961). *See, also*, *Union Pac. R. Co. v. Burke*, 255 U.S. 317, 321 (1921) ("This Court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence.").

Railroad carriers' negligent inspection of freight cars prior to carriage or to take reasonable preventive steps along the route of movement can be considered the cause of damages. Railroads themselves in many cases have impleaded shippers in third party actions, and shippers often have been able to exculpate themselves from liability by demonstrating that the railroad failed to discharge its duty to properly inspect the railcar. In other cases, courts have placed

shared responsibility upon carriers and shippers, apportioning liability accordingly. *See, e.g., Hawley v. Delaware & Hudson Ry. Co.*, 514 F. Supp. 2d. 650, 659-60 (M.D. PA 2007).

Provided that a defect in the car is one which the carrier could discover by reasonable inspection, a railroad breaches its duty of inspection if it fails to discover such a defect. *Alabama Great Southern R. Co. v. Allied Chemical Corp.*, 501 F.2d 94 (5th Cir. 1974).

What the foregoing cases illustrate is that liability for collisions in rail yards, such as the overspeed accidents repeatedly mentioned by UP in its Reply, is a question of fact. Liability can be apportioned and damages divided between two or more parties, *Chicago R. I. & P. R. Co. v. Chicago & N. W. Ry. Co.*, 280 F.2d 110 (8th Cir. 1960). This point was made in NAFCA's Opening Statement. Other than CP's vacuous claim that Item 200-B does not relieve UP of its legal responsibilities, there is no showing in UP's Reply that state law is somehow insufficient to apportion responsibility for "unsafe" cars.

V. UP'S RATIONALE FOR ESTABLISHING ITEM 200-B REFLECTS UNSUPPORTED SUPPOSITIONS

UP asserts that it "established Item 200-B as part of a program designed to reduce the incidence of overspeeding railcars in its classification yards and to mitigate other safety hazards created by product residue on the exterior of railcars," adding that Mr. Ronci's verified statement "describes how product residue on railcar wheels and safety appliances can interfere with UP's safe, reliable, and efficient operations." Reply at 8.

If these claims were supported by a comprehensive study, or factual data more compelling than pictures of the few cars said to have experienced collisions after leaving retarders at excess speed, UP's claims might have some credibility. However, UP has produced no documentation to support its assertions that shipper practices are the sole cause, or even the main cause, of fouled retarders at UP yards.

A. Safety Hazards Allegedly Created by Product Residue on Railcar Wheels

The first reason advanced by UP for establishing Item 200-B is "Safety Hazards Created by Product Residue on Railcar Wheels." Reply at 9. UP describes "Safety Hazards Created by Product Residue on Railroad Wheels," as incidents "caused when cars exit retarders at an excessive speed.... Derailments and collisions caused by overspeeds can damage other railcars and their ladings, damage railroad property, and disrupt yard operations. They also pose dangers to the safety of UP personnel working in the vicinity of classification yard tracks." Reply at 9, citing Ronci V.S. at 4-5.

UP (fortunately) is unable to report any personal injuries resulting from these "overspeed" incidents, or cite to any more overspeed incidents than the 17 it reported to FRA between January 2008 and November 2011. UP claims that it has "experienced a far greater number of non-reportable overspeed incidents than it recorded with FRA." Reply at 10. UP states that "FRA rules require a carrier to report incidents if they cause injury or death, or if they cause rail equipment damage that exceeds a certain threshold. In 2011 the threshold was $9,400." *Id.*

Mysteriously, UP does not supply the number of "incidents" involving equipment damage lower than $9,400 per car or the gross amount of that damage. Apparently, only 17 incidents involving greater amounts occurred between 2008 and the end of 2011, and fewer than half that number in the four years preceding. The 17 incidents between 2008 and the end of 2011 involved "over $700,000 of reported damage" (Reply at 10), which amounts to $175,000 per year. Considering the fact that UP's operating expenses extend into billions of dollars per year, $175,000 certainly does not justify the liability revolution sought by UP, particularly in light of Item 200-B's failure to take into account the possibility that other factors, including UP's own actions, might be responsible in whole or part.

One example of possible contributory negligence by UP is set forth in the Rebuttal Verified Statement of John Martin, NAFCA's Rebuttal Exhibit No. 3. As Mr. Martin explains, tank cars move as part of larger trains. If a tank car manway cover or outlet valve leaks, the leak is unlikely to be spotted by UP immediately upon occurrence, and the leaking substance may well then contaminate wheels on following cars which were not part of the same shipment containing the leaking car. In other words, a car belonging to a completely innocent shipper might end up being a cause of retarder contamination. That innocent shipper could then become subject to the Item 200-B penalties.

Darrell Wallace, in his Rebuttal Verified Statement (Exhibit No. 4), discussed in more detail below, provides a UP car tracing report illustrating the number of times a car is placed in a new train on a cross-country trip and how many times the car is stopped enroute for a period of one or more hours. Each time the car is placed in a new train, a pre-departure inspection should be performed. And, in any event, each time a car is left standing at a UP station for more than an hour, there is ample opportunity for UP to seek out any product seepage.

B. Safety Hazards Allegedly Created by Product Residue on Railroad Safety Appliances.

The cost impacts it cites are low, but UP goes on to warn of personal injury dangers, possibly including "death" for "railroad employees, perhaps falling under a moving railcar." NAFCA takes seriously the safety of workers, both for railroads and for shippers and consignees. Fortunately, the record discloses no actual injuries due to residue on railroad safety appliances, which include "ladders, handholds, brake handles, running boards, and catwalks." These appliances allow railroad (and other parties') personnel to climb and hold on to the railcars.

UP identifies food and petroleum oils, tallow, lards, and molasses as products that could interfere with the fully safe use of safety appliances. Reply at 11. UP asserts that its "focus on

safety has produced continuing reductions in its personal injury FRA reportable rate," but it provides no data to support that claim.

What UP neglects to mention is that safety appliance accidents often are avoidable through the actions of the employees themselves. Shipper employees engaged in loading and unloading cars normally wear heavy-duty work gloves, which help the employees to avoid slippage on oily or slick safety appliance surfaces. See Martin Rebuttal V.S. Mr. Martin believes that the use of heavy-duty work gloves by employees loading, unloading, and working on freight cars is the rule, rather than the exception, among shippers. Railroad employees could adopt the same practice if they do not do so already.

Obviously, NAFCA does not advocate allowing safety appliances to become covered with product residue or other materials such as mud. As explained in NAFCA's opening statement, NAFCA members normally take steps to insure that safety appliances are free from residue.

Shippers take other precautions against accidents related to unclean safety appliances, in particular the elevated catwalks on the top of most cars. These sometimes slippery catwalks were designed to provide access for a loader to the actual point of loading, such as a manway dome. Today, more and more shippers do not use the catwalks, but instead utilize platforms that have been built by the shipper alongside the tracks so that loader can reach the loading point on a car without using the catwalks or ladders leading to them. Moreover, Mr. Wallace's company, Bunge, does not allow workers to even use wooden platforms unless they wear "fall protection," which is essentially a harness tethered to a safety pole. Wallace, Rebuttal V.S. Other shippers follow the same practices. *Id.*

We recognize that some product residue may not easily be coped with simply by wearing work gloves. Hardened tallow residue on safety appliances, such as shown in the photographs introduced by UP, may be an example.[5] To the extent it can be demonstrated that a shipper's negligence brought about such conditions, in whole or in part, then NAFCA would agree that the shipper could be found liable, in whole or in part, under state negligence law for any resulting damages. But Item 200-B falls far short of evaluating such a situation under tort law, which recognizes that both parties may be responsible to one degree or another.

C. UP's Description of the Commodities Covered by Item 200-B Shows That the Provision is not Properly Tailored to Meet Known Conditions of an "Unsafe" Nature.

As UP concedes (Reply at 14-16), Item 200-B "applies to all commodities, [even though] not all commodities have the same potential to cause the types of safety hazards the provision was designed to reduce." UP claims that it maintains a database in which it records "incidents" involving product residue and that the database identifies more than 25 different commodities that have been involved in these incidents.[6] Nevertheless, UP identifies a small group of commodities as being more prominently involved in incidents than others, such as oils, tallows, and greases (Reply at 14). Other commodities, namely, salt and potato flakes, are mentioned but not asserted to be major causes of wheel problems. *Id.*

UP asserts that: "When product residue is found on the exterior of a rail car, it is always the result of a problem that occurred during loading or unloading – processes that are under the

[5] Several of the photographs relied upon by Witness Ronci were not produced by UP in discovery. See, e.g, Ronci Exhibit 2, p. 4; Ex. 4, pp. 1, 2, 3, 5. Documents that were produced by UP in discovery have the "Bates" numbers assigned to them by UP.

[6] Oddly, UP's database of incidents either is suspiciously devoid of information regarding overspeed retarder events involving less than $9,400 per car in damages, or UP chose not to disclose the number of such events because it knew that the numbers were not great and would make its alarmist arguments look foolish.

control of shippers and receivers, not UP." Reply at 15. That assertion is a misstatement of reality and an overly broad claim.

UP argues that "liquid products can spill directly on the rail car and the rail car safety appliances during the loading or unloading process, and they can also run down the sides of the rail car and work their way down to the wheel during the loading process...." UP offers no proof to support that statement, other than the speculation of Mr. Ronci, and it is a claim that in fact makes no sense. If liquid products do spill on a rail car during the loading process, they spill in the area of the manway cover, which is approximately 35 feet from the wheels. Gravity would lead such spillage to run directly down the side of the rail car while it is being loaded, and not to make a 90 degree lateral change in direction toward the wheels.

UP also claims that product spills can work their way down to the wheel while the train is in transit. Whether such an event occurs, however, is plainly related to a number of factors, including the volume of the spill, the speed of the train, the force of the wind, and other eventualities. Assuming that such situations can exist, it is incumbent on UP to provide whatever factual support it has for such a claim in any given instance.

Another UP claim is that "liquid products may leak in transit because the rail car was not adequately secured in the first place ... sometimes because the car was overloaded." NAFCA does not deny that there are occasions when liquid product may leak from a car while in transit. However, just because a car leaks in transit does not mean there was no leak evident and correctable when the car was idle. If the car was leaking at the outset, and had product residue running down from the manway cover or the outlet valve, that condition should have been observed when UP made its pre-departure inspection under FRA rules.[7]

---

[7] See NAFCA Opening Statement, Exhibit 3.

Nor does UP make any effort to show that leaks in transit occur only due to improper loading at the most recent origin, as opposed to jolts or impacts due to track conditions or third parties' actions, or product residue on a given car's wheels that came from leakage from a prior car moving over the same track. These possibilities can be taken into account under state law but not under Item 200-B.

UP argues that liquid and dry products "may get on rail car wheels because the industry track on which the cars are loaded or unloaded is fouled with product." Reply at 16. NAFCA's Opening Statement and its discovery responses to UP (Interrogatory No. 3, UP Counsel Exhibit C), show that product residue on the ground is promptly cleaned up by NAFCA members. On the other hand, UP claims that a soybean oil release at UP's Wichita yard was so extensive that it caused the yard to be shut down for about five hours and that other releases have required 10 hours of clean-up or longer. Ronci V.S. at 10. Why these releases were so extensive, and why the car responsible was not identified before it caused such extensive leakage, are unexplained by Mr. Ronci.

It appears that, for an average car, UP has ample opportunities to inspect for and detect leaking liquid lading before the car gets to the point where it is creating a huge pool of product that covers UP's tracks and may contaminate the wheels on following cars. See Rebuttal Exhibit No. 4. Rebuttal Exhibit 4-A, attached to Rebuttal Exhibit No. 4, is a car trace report produced by UP for a car shipped by _____

_____

_____. FRA rules attached as Exhibit 3 to NAFCA's Opening Statement clearly require a pre-departure inspection

"at each location where a freight car is placed in a train." 49 C.F.R. 215.13(a). Even if such inspections were not required by FRA rules, _____ _____ and afforded UP opportunities at those stops to look for product spillage on the wheels or elsewhere. There is no documented evidence by UP that it takes advantage of these opportunities to inspect cars and possibly avoid the overspeed retarder exits about which it complains.

It needs to be remembered that most cars moving on UP travel hundreds of miles before they are classified at a hump yard. During these journeys, cars move through mud, dust, and other materials that do not have their origins in the car itself. A railroad right-of-way is simply not a pristine place. Along its right-of-way, UP, like some other railroads, has automatic devices that dispense oil onto its tracks to reduce wheel friction at certain track curvatures. That oil may itself be slippery or may attract other debris to the wheel, and provide a reason why retarders do not function ideally. Wallace, Rebuttal V.S.

What is also evident is that where a shipper car leaks in a carrier yard, it is entirely possible that the leaking car, being part of a train, has trailing cars that will move across tracks in the leakage area and in all likelihood pick up leakage on their wheels from the offending car. See Martin Rebuttal V.S. If non-leaking cars did not come into contact with product residue until they arrive in UP's yard, the shippers of those cars could be exposed to liability through no fault of their own.

There is no documentary evidence that UP inspects cars entering its classification yards for product residue, even when those cars contain products that UP acknowledges to be among the primary sources of wheel contamination. Although UP asserts that it does inspect cars entering classification yards (Ronci V.S. at 16), it also claims that it has no records setting out any

such cars found to have wheel residue (*Id.*), and it advances the totally contradictory claim that "stopping a car, and the interrupting operations, is disruptive." *Id.*[8] UP apparently finds it less disruptive to wait until after an overspeed incident occurs before taking any remedial steps. This issue will be discussed in more detail below.

D. Rules of Other Carriers Are of No Assistance to UP.

UP offers exhibits including a BNSF Railway tariff (UP Counsel's Exhibit D) and a CSX Transportation Customer Rail Safety Guidebook (Counsel's Exhibit E), arguing that its own Item 200-B is an industry standard (Reply at 16-19). But the comparable provisions of BNSF Tariff Item 3251-B are applicable only to covered hopper cars, and the BNSF tariff version supplied by UP took effect on November 15, 2011, thereby setting no precedent for UP's own Item 200-A, which took effect in July 2008. The BNSF Tariff, moreover, contains no language similar to the last paragraph of UP Item 200-B, which attempts to excuse UP from liability due to its acceptance of an "unsafe" car. If anything, the BNSF Tariff shows that, once UP introduced Item 200-B, other carriers followed partial suit.

The CSX publication is not a tariff, but only a "guidebook." It contains no provisions that might be construed as displacing civil law remedies, which is how Item 200-B must be read.

E. Shipper and Receiver Policies.

Pages 19-24 of UP's Reply largely support NAFCA's claims that shippers generally take reasonable and effective steps to ensure that the loaded cars they tender to UP for transportation are "safe." As UP itself put it: "NAFCA's responses to UP's discovery requests in this proceed-

[8] UP's claim that it has no records of cars set out along a route is suspicious, given the fact that UP makes available to its customers a per car movement record of the type attached as NAFCA Rebuttal Exhibit 4-A.

ing show that UP's customers recognize their responsibility for preventing product residue from being deposited on railcars during the loading or unloading process." (Reply at 19-20).[9]

However, there is a vast difference between a shipper undertaking a responsible course of action, and a tariff imposing a legal "obligation" on the shipper. As UP's reply demonstrates, shippers are far from irresponsible when it comes to tendering cars to UP suitable for transportation – far more responsible, in fact, than is UP in tendering unclean, empty cars to NAFCA members for loading. See NAFCA Op. St., Ex. 11, Verified Statement of James Bobitt.

VI. UP'S USE OF ITEM 200-B AS PART OF A BROAD EFFORT TO REDUCE SAFETY HAZARDS ASSOCIATED WITH LEAKING RAILCARS AND PRODUCT RESIDUE ON THE EXTERIOR OF RAILCARS

NAFCA agrees with a number of UP's assertions at pp. 24-32 of its Reply, but UP's arguments cannot rehabilitate Item 200-B. For example, UP contends that it works with customers to help them understand and address product residue issues. Reply at 25. That is so, and as it should be, but UP's efforts should not be recognized for the wrong purpose. They demonstrate that there are avenues available to UP other than a tariff imposing penalties, switching costs, and potential legal liability that attempts to foreclose the opportunity for the shipper to demonstrate comparative fault when accused of wrongdoing, setting aside the unreasonableness of UP's attempt to immunize its own actions.

UP's description of its efforts to eliminate alleged safety hazards contains the statement that "Item 200-B does not create a "white glove" cleanliness standard for railcars....UP has no interest in disrupting the operation of an entire train or the operation of its switching yards and delaying service for its customers because a car is a *little dirty*." Reply at 25; emphasis added.

[9] UP states that "NAFCA did not indicate in its written discovery responses which members have adopted which particular policies." Reply at 21. However, this intimation that NAFCA's discovery responses were wanting in some respect is unwarranted. The format of NAFCA's discovery responses, including NAFCA's failure to indicate "which members have adopted which particular policies," was pursuant to an explicit agreement between the parties regarding the nature of the discovery responses that would be required from NAFCA.

This highlights one of the defects of Item 200-B; namely, that it does not identify the amount of product residue that is objectionable, or provide any standard for a shipper to determine the amount of product residue that UP thinks could cause a car to become "unsafe" for transportation. UP says that its customers "understand the difference between a car that might not pass a 'white-glove' test and a car that is unsafe," but offers no substantiation for this clairvoyant view. Item 200-B contains no standards for the guidance of UP's customers, and it has never invoked Item 200-B to penalize a customer. Its standards for compliance with Item 200-B therefore remain an impermissible mystery. *See Arkansas Electric Coop.* (finding tariff unreasonably creates too much uncertainty over sufficiency of coal dust mitigation measures).

UP states that "there are certain costs associated with the delay and efficiencies caused when cars must be set out for cleaning that cannot readily be quantified, and UP believes it is fair to provide for recovery of those costs through a reasonable surcharge" Reply at 27. These "certain costs" are not disclosed by UP and, even though UP asserts that such costs "cannot readily be quantified," it claims it is "fair to provide for the recovery of those [undisclosed and unquantified] costs through a reasonable surcharge." Reply at 27. These claims are non sequiturs. If the costs cannot be quantified, how can UP assert with credibility that its $650 surcharge is "reasonable." In fact, it is a totally arbitrary surcharge.

A. UP Claims to Need Customer Cooperation to Help Address the Problems Of Leaking Railcars and Product Residue on the Exterior of Railcars

At pages 28-32 of its Reply, UP contends that its customers are in the best position to prevent leaking railcars and railcars with exterior product residue from moving on UP. In some situations, customers may indeed have an opportunity to prevent leaking railcars, but it does not follow that the customers are in the best position to prevent those cars from moving on UP. UP is directed by FRA regulations at 49 C.F.R. Part 215.13 to inspect railcars for unsafe conditions

before they are moved in a train, and each time they are moved in a new train. And it has ample opportunity, and far better opportunity than any shipper, to control leakage enroute. See Wallace Rebuttal V.S.

UP asserts that its personnel are *instructed* to "inspect railcars in accordance with FRA rules," Reply at 29. It does not say that they actually do so. No copies of instructions to train crews to examine for product residue are furnished by UP (in contrast with the instructions, *supra*, given in writing by NAFCA shippers to their employees regarding pre-departure car reviews). If Item 200-B is approved as is, what incentive will UP have to perform pre-departure inspections that go beyond checking air hoses and perhaps looking for cracked wheels?

Surprisingly, UP asserts that "railcars with product residue problems might have residue present that is not readily visible to a train crew when the pre-departure inspection takes place" and that the "FRA pre-departure inspection rules do not require UP train crews to inspect specifically for the presence of product residue on the exterior of railcars" (Reply at 30-31), once again indicating that UP does not really believe FRA rules mandate a pre-departure inspection for unsafe product residue on wheels.

In a companion argument, UP asserts that "difficulties in detecting ... products are compounded when railroad operations occur at night or in rainy conditions." Reply at 31; Barnum, V.S. This is a surprising contention, given that it was never raised during discovery when UP had the opportunity to do so. NAFCA's Interrogatory No. 2 to UP inquired:

> State whether the pre-departure inspection procedure set forth at 49 C.F.R. Part 215, App. D, is always followed by UP at all times, day and night, regardless of whether visibility is poor, or is sometimes not followed during other than day light hours.
>
> UP Response

> Subject to and without waiving its objections, UP states that at 490 C.F.R. Part 215, App. D does not provide a procedure" for inspections of rail cars to be made prior to train departure; rather, FRA regulations require an inspection of certain "conditions set forth in Appendix D. UP further states that it directs its employees to conduct the required inspection of railcars in all weather and visibility conditions and that it is not aware of situations in which rail cars move in a train without receiving an inspection.
>
> Interrogatory No. 3: If UP performs pre-departure inspection when there is no sunlight, state whether UP relies on overhead lighting of the area in which the car is located, or hand-held lighting devices and state whether employees responsible for inspections are provided or directed to carry hand-held lighting devices.\
>
> UP Response
>
> Subject to and without waiving its objections, UP states that U's safety rules require employees to use appropriate lighting when conducting required inspections. UP further states that it provides its employees with a hand-held lights or hands-free lamps, as well as necessary batteries, for situations in which they are required to provide appropriate lighting.

No claim was made by UP that its employees were ill-equipped to conduct inspections at night or in inclement weather. Indeed, FRA car inspection regulations provide no exceptions for weather or lighting conditions. If UP feels that it cannot adequately comply with FRA's rules, its option is not to move a train until inspection compliance is completed. It is not to insulate itself from liability by imposing strict liability on shippers to essentially do UP's job for it, despite darkness or bad weather.

UP argues that while it "considers the presence of product residue to be a significant safety issue...that does not logically imply that any failure to detect the presence of product residue in a pre-departure inspection either violates FRA rules or somehow prevents UP from requiring the responsible party to clean the residue if it is detected at some later time." Reply at 31. This statement contradicts UP's argument (Reply at 44) that it remains obligated to inspect cars and

remains responsible for its own negligent acts. See also Appendix D to 49 C.F.R. Part 215, which states:

> [T]he freight car shall, as a minimum, be inspected for imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination. These conditions are readily discoverable by a train crew member in the course of a customary inspection.[10]

Included on the list of things to be checked, as a minimum, is "Any other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination." According to Item 200-B itself, residue on wheels is just such a "safety hazard." Arguably, FRA itself does not require a "white glove" pre-departure inspection, but it requires more than a stroll past the cars and the occasional glance at safety appliances and wheels.

UP's use of the term "responsible party" implies that the shipper is the responsible party, given UP's prior assertions that all product residue issues originate with a shipper. However, the "responsible party" may be UP, the shipper, a third party, an Act of God, or some combination of these. Item 200-B is unreasonable in part because it does not recognize any of these possibilities except shipper liability.

B. UP's Claim That It Cannot Eliminate Product Issues Through Inspection Alone

This assertion appears at page 32 of the Reply. UP's reasoning is that because it has often (although it does not disclose how often) stopped rail cars for cleaning before they are humped, and this has not stopped 100% of overspeed incidents, therefore "inspection by itself is not a complete solution." It is true that even a thorough pre-departure inspection may not prevent all leakages in transit, particularly where impacts or other events in transit are the proximate cause of the leak. Moreover, poorly performed pre-departure inspections that overlook debris

[10] Apparently, UP Witness Barnum, who testifies that it is difficult for UP crews to discern what UP regards as "potentially hazardous" substances – oil or such – on wheels during inclement weather does not agree with FRA that hazardous substances are "readily discoverable by a train crew."

can be expected to fall short of preventing all retarder problems. However, UP seems to be espousing the principle that if its pre-departure inspections are inadequate, the solution is not better or additional inspections, the answer is rather to shift burdens, costs and risks to shippers. But this reasoning creates a perverse incentive for UP to take pre-departure inspections lightly (as it may do). And, it should not be forgotten that UP has other opportunities, as described by Rebuttal Witness Wallace, to inspect cars enroute. The world described by UP includes many opportunities for car inspections, all of which are either not pursued or are ineffective, and are among the apparent reasons why UP wants to shift the risks of car operation to its customers.

All of UP's evidence describing overspeed retarder exits leading to car collisions relates how the time to repair any damage will interfere with the efficient operation of its classification yards. It claims that inspection of retarder devices during the classification process is "impracticable," although no explanation is given as to why that is so.[11] So far as the record made by UP shows, there are no solid reasons why UP cannot be more pro-active in the inspection of cars along their routes or moving into classification yards, and the inspection of retarder devices themselves. AAR's Interchange Rule No. 1, binding on carriers, states that a railroad is responsible for cars while on its line. Item 200-B contradicts AAR Rule No. 1, as does UP itself when it fails to take advantage of all opportunities to inspect cars for defects.

---

[11] See NAFCA's Interrogatory No. 12 to UP and UP's answer, as follows:

Interrogatory No. 12

> Please describe fully the inspections made of retarder devices in hump yards before each car progresses to and through the retarder device. Please include in your explanation a statement of whether it is impracticable or for ... other reasons not normal operating practice for the retarder to be inspected between applicators to specific cars.

UP Response

> Subject to and without waiving its objections, UP states that UP personnel do not inspect the retarder devices at hump yards in between each rail car that progresses through the retarder device and that doing so would be impracticable.

VII. NAFCA'S RESPONSE TO UP'S CLAIM THAT NAFCA HAS NOT MET ITS BURDEN OF PROVING THAT ITEM 200-B IS UNREASONABLE

Once again repeating a recurring and mistaken theme of its Reply, UP contends that "Item 200-B reflects the common-sense principle that the best way to protect against the safety hazards and operational disruptions created by product residue on the exterior of rail cars is to require the parties loading and unloading the cars to secure the cars properly and remove product residue from the exterior before releasing the cars to UP." Reply at 33. That, however, is not really what this case is about, since UP admits that most of its customers remove exterior product residue most of the time. See *supra*. Instead, if there is any common-sense principle that emerges from this case, it is that UP has made a choice that creates more harm than good. It describes at length (Ronci V.S. at 4-6) how cars that exit classification yard retarders at excess speeds due to product residue on the retarder clamps cause not only property damage, but a disruption in the service provided through the classification yard, described by UP as "costly." Yet UP discloses no records of problematic cars removed from trains before or as they enter classification yards.

Alternatives to UP's wait-and-see policy would be for UP to inspect its retarder devices while they are in service,[12] to inspect cars when they stop along their routes, or to inspect cars entering a classification yard, particularly cars containing products noted by UP for their potential disruptive effects. Granted, inspecting cars entering classification yards and approaching retarders might well cause some disruption in UP operations. However, there is no evidence that a cursory inspection of retarders by an employee standing by would not reduce disruptions more cost-effectively than Item 200-B. Even if UP acted in a manner that slowed its operations before a car went through the retarder, no reason is offered by UP why the service delays that might result would be worse than those that occur after an overspeed retarder incident. Moreover, the

[12] Cars pass through retarders at the rate of two to three per minute, which would allow an employee standing by to make at least a cursory inspection between cars.

former course of action would avoid property damage and what UP describes as a threat to human safety and lives from overspeed collisions.

A. UP's Arguments Regarding Safety Shield the Real Purposes of Item 200-B.

The language of Item 200-B, as well as UP's Reply, *inter alia*, suggests that UP would like the Board to believe that Item 200-B is nothing but an effort to improve safety, and thus a "Reasonable Objective." Reply at 36-44. NAFCA does not take issue with the fact – and indeed agrees wholeheartedly – that safety in rail operations benefits railroads, their customers, and the public interest.

However, NAFCA does not agree that safety is UP's *real or only* goal. UP devotes a substantial portion of its reply to explaining the exemplary extent of its customers' efforts to maintain safe carloading practices, as discussed previously. There were only 17 reported overspeed retarder incidents in the past four years (including those that could have been prevented by UP itself), out of the tens of thousands of cars that no doubt traversed UP retarders during those years, which hardly suggests that drastic, new remedial steps are necessary to compel a change in customer behavior. All of UP Witness Ronci's opinions regarding the perils of classification yards appear hugely overblown when there have been only slightly more than four incidents per year over the past four years, a ratio of incidents to cars traversing classification yards that is so deep in the decimal points as to be masked by rounding.

NAFCA believes that, given UP's praise for the conduct of most of its customers and the microscopic number of classification yard incidents, the real objective of Item 200-B cannot be "safety." Rather, NAFCA believes that UP's objective, as explained above, is to replace tort law with the "law" of freight tariffs, in this case seeking to create a legal "obligation" to replace good business practices now followed by UP's customers and to erect a barrier, through the last sen-

tence of Item 200-B, should a shipper need to raise a defense of blamelessness or contributory negligence in any claim brought by UP for a "residue" related collision. As stated by NAFCA in its Opening Statement, without contradiction by UP, UP has reduced its force of freight train carmen (those employees especially qualified to conduct car safety inspections)[13] As noted above, it experienced over a 50 percent increase in overspeed retarder incidents over the past eight years. UP knows its choices and practices have led to an increased risk of safety problems, and it is attempting through Item 200-B to pass the risks of its reductions in qualified expert carmen to its customers.

B. UP Asserts That There is no "Proof" that "UP Cannot Reasonably Require Shippers and Receivers to Load and Unload Their Products Safely"

UP mistakenly claims that NAFCA "does not appear to dispute seriously that shippers and receivers have an *obligation,* when they tender cars to the railroad, to insure that the cars have been properly secured and are free of exterior product residue." Reply at 40; emphasis supplied. As noted previously, NAFCA *does dispute* the existence of any such "obligation" as a matter of law, although, as a matter of good business practices, its members work hard to ship clean, properly secured cars.

Similarly, UP asserts that there is no "proof" that it is "unreasonable for UP to hold shippers and receivers to their basic responsibly to tender cars in a safe condition, *even after the cars have been accepted by UP.* Reply at 41; emphasis supplied. However, once cars have been accepted by UP, there can be no presumption that they were in unsafe condition at the time of acceptance. What may occur thereafter, or become evident thereafter, is a matter of real proof, and UP's failure to inspect, or inspect adequately, or to inspect whenever opportunity arises, may be a defense. It is an unreasonable practice for UP to preempt this defense through a tariff provid-

[13] See Grossman, Rebuttal V.S., Exhibit 5 hereto.

ing that if leakage or wheel-related accidents occur after UP has accepted a car into transportation, they are wholly the fault of the shipper's "obligation" to tender clean cars.

UP argues, without dispute by NAFCA, that "Item 200-B applies [sic. to] any party "releasing a loaded or empty railcar for movement on UP's lines." Reply at 41. Thus, UP contends, Item 200-B does not hold shippers responsible for lading residue problems introduced by receivers. *Id.*

NAFCA's evidence demonstrates that, in the majority of instances where UP empty cars are placed for loading, they already have product residue on them. NAFCA Opening Statement, VS Bobitt, Ex. 11. UP contends that the movement of its empty cars to a loading position when the cars contain product residue is not prohibited, and that such a practice is not in any way condemned, in a case cited by NAFCA, *Liability for Contaminated Covered Hopper Cars*, 10 I.C.C. 2^{d} 154 (1994). Reply at 42. UP tries to distinguish *Hopper Cars* on the ground that "Shippers had no obligation to insure that railroad-furnished equipment had been properly unloaded." Reply at 43.

Let there be no doubt: UP's anemic attempt to distinguish *Hopper Cars* aside, "[i]t is well established that the duty to discover and remedy defects in railroad cars lies primarily with the operating carrier." *Torres v. Southern Pacific Transportation Co.*, 584 F.2^{d} 900, 901 (9th Cir. 1978). Aside from Mr. Ronci's unsupported assertions that UP inspects empty cars upon tender to it for return movement, there is no UP evidence of any reports, records, or other documented proof that such inspections are not more theoretical than real.

A problem arises under Item 200-B when an empty car is placed for loading with product residue in visible quantities, as testified by NAFCA Witness Bobitt. If the prospective consignor does not remove that residue at its own expense, or pursues the disruptive prerogative of

rejecting the car to UP (a practice not favored by either shippers or UP), then the shipper stands in jeopardy of having the car subjected to the penalties and costs arising under Item 200-B when the car, now loaded, is tendered to UP. UP appears unable to distinguish between lading residue that was on the car when it arrived as an empty, and lading residue flowing from the loading process; nor may it wish to. Thus, the shipper runs the risk of penalties under Item 200-B if it does not clean debris from an empty car placed for loading. That is an undue and unreasonable burden imposed by Item 200-B.

C. UP Admits the Possibility that Both It and Its Customers May Legitimately Dispute Liability

After more than 40 pages of rhetoric, UP finally concedes that "NAFCA's complaint reflects the theoretical possibility a shipper and receiver may dispute which one is responsible for the presence of product residue in a particular situation." Reply at 43. That is precisely NAFCA's point, although the possibility is far from "theoretical." A shipper and a carrier may, indeed, dispute which one is responsible for the presence of product residue or for overspeed retarder exits, and whether much or all of the fault rests with UP or other parties or causes. That is the essence of why Item 200-B is unreasonable; it unreasonably tilts the scales in favor of UP whenever such a dispute arises by imposing penalties that assume shipper/consignor liability in all cases.

Because disputes regarding the party or parties responsible for a negligent act or omission on UP's system, or any other railroad's system, may well give rise to litigation over degrees of causation or negligence, there is all the more reason why the Board should find unreasonable any tariff provision that can be used by a railroad to skew resolution of such disputes in its own favor. Those disputes at present can be resolved under state tort law and it is unreasonable for UP

to impose by tariff an "obligation" on its customers or to excuse itself from the consequences of its acceptance of a car into transportation.

UP's argument that Item 200-B does not displace UP's obligation to inspect rail cars (Reply at 44) is totally beside the point. The issue is not confined to whether UP has an obligation under FRA rules to conduct pre-departure inspections. The question is whether Item 200-B's last sentence, placing an "obligation" on consignors to tender cars "suitable for safe movement" regardless of whether those cars have been accepted into transportation by UP, deprives shippers of legally-recognized defenses.

UP faults NAFCA for failing to prove that "inspections conducted in accordance with FRA regulations are sufficient to detect any product residue problems." Reply at 45. But the FRA regulations are unambiguous. To the extent that product residues are so severe as to jeopardize safety, they are covered by Appendix D to 49 C.F.R. Part 215, which requires, *inter alia*, that pre-departure inspections, "as a minimum," include "Any other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination."

There is no basis for UP's argument that it can fail to conduct the pre-departure inspection required by FRA, and still place all blame for retarder incidents on shippers. See also, *Consolidated Rail Corp. v. ICC, supra,* 646 F.2d at 640: "The railroads may indeed seek to prove the reasonableness of additional safety measures, but the burden is on them to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstances." The Board has its own authority under its governing statute, as recognized in *Consolidated Rail Corp.* and in *Railroad Ventures, Inc. – Abandonment Exemption*, Docket AB 556 (Sub-No. 2X, April 28, 2008). However, UP's collateral attack on FRA regulations as potentially inadequate cannot serve as a justification for Item 200-B.

If UP wants to pursue other avenues, such as visiting its customers' facilities to encourage safe loading practices, UP does not need Item 200-B to do so. There is, moreover, no reason why NAFCA should have to prove that inspections pursuant to FRA regulations are "sufficient to detect any product residue problems." UP asserts that it abides by those regulations, which require it to remove from a train any car found to be in "unsafe" condition. If UP is guided by a higher standard, it fails to disclose that standard or say why the FRA regulations are insufficient. Thus, UP's suggestion that it performs "inspections in excess of FRA-mandated requirements" (Reply at 46) is a red herring.

D. Item 200-B is Not Consistent with Board Precedent

Although UP contends that "Board precedent gives railroads wide latitude to establish reasonable rules involving the loading and unloading of rail cars" (Reply at 47), that statement begs the question, which is whether Item 200-B constitutes a "reasonable rule." Nor is UP's cause advanced by its assertion that "NAFCA claims that UP has not demonstrated a 'significant dirty car' hazard." Reply at 47. Despite Witness Ronci's efforts to describe as many horrors from exterior car residue as he can contrive, the fact remains that out of the "millions of cars each year" picked up by UP (Reply at 45-46, fn. 29), there are only 17 documented incidents of actual damage resulting from residue on car wheels.

These data certainly are sufficient to show that there is not a significant "dirty car hazard" on UP. UP points to no case in which the Board has approved the type of sweeping tariff that UP has published based on such a small number of incidents, whether measured in absolute terms or in comparison to the total volume of UP's traffic.

In its Opening Statement, NAFCA cited *Arkansas Electric Coop.* to demonstrate that a carrier's "safety" rules may be unreasonable, as they were found to be in that case, if the carrier

involved had failed to provide a "safe harbor" provision. UP attempts to distinguish the *Arkansas Electric* decision, stating: "The problem with BNSF's coal dust rule was that shippers could not be assured of complying with its requirements: even after loading their cars correctly, coal dust could escape during transit.... The Board believed that the shippers should have been able to take steps so that, following safe loading, they could be certain that the carrier would move their commodity without penalty." Reply at 48. UP fails to distinguish the *Arkansas Electric* case. To the contrary, *Arkansas Electric* demonstrates that Item 200-B suffers from precisely the same deficiency as the BNSF tariff because even after safe loading of a car tendered to UP, shippers cannot "be certain that [UP] would move their commodity without penalty." *Arkansas Electric* at 12.

This problem is underscored by the lack of guidance in Item 200-B regarding the amount of exterior residue that would make a car "unsafe" in the eyes of UP. UP offers the argument that, on the one hand, this lack of clarity will not be an issue if the shipper simply "complies with the tariff," while offering the inconsistent argument that UP is "not applying a white-glove test." Reply at 49. Thus, its customers have to make the choice between leaving a "little" amount of non-white glove residue on a car exterior or leaving an "unsafe" amount, which is not defined.

UP asserts that its customers know the difference between safe and unsafe and need no further guidance from the tariff, but the determination of what is safe and what is unsafe plainly is a subjective judgment that may differ from loading point to loading point, depending on the outlook of the UP crew placing a car into transportation service. With significant monetary penalties attaching if a shipper guesses wrongly about unacceptable (or acceptable) residue amounts, UP's tariff must be more specific about unacceptable levels of residue.

UP attempts to dismiss the relevance of the FRA's power to fine shippers with leaking cars, contending that "leaking cars are not the same as cars with lading residue on the wheels or safety appliances." Reply at 50. As NAFCA believes UP understands fully, there are no FRA fines applicable to shippers for lading residue on car wheels. The FRA fines are far more strict; they apply to leaking cars regardless of where the leakage goes.

Finally, UP maintains that "surcharges or penalties to encourage efficient behavior or discourage violations of rules are a well-established feature of tariff provisions," citing *National Grain and Feed Ass'n. v. Burlington Northern Railroad Company,* 8 I.C.C. 2d 421, 434 (1992). However, UP neglects to inform the Board that the case it cites was reversed and remanded on appeal specifically because Burlington Northern's rules were deemed to be problematic obstacles to the fulfillment of its common carrier obligations. *National Grain and Feed Association v. United States,* 5 F.3d 306 (8th Cir. 1993).[14]

E. The National Rail Policy Does Not Salvage Item 200-B.

This case does not turn on the National Rail Transportation Policy, but instead on the question of whether Item 200-B is reasonable or unreasonable. Obviously, the Rail Transportation Policy encourages safe transportation, but it also discourages predatory railroad practices.

---

[14] UP also refers to various Counsel's exhibits to support the claim that penalties are a commonplace means by which carriers seek to discourage violations of rules. The first of these exhibits is Counsel's Exhibit D, a BNSF tariff containing a provision issued in October 2011 that applies to covered hopper cars only and mirrors Item 200-B to a great extent. The BNSF tariff, however, contains no provision similar to the last sentence of UP's Item 200-B.

Counsel's Exhibit K, likewise cited by UP, consists of a series of tariffs governing overloaded cars. The first such tariff is that of BNSF, and contains a "safe harbor" allowance of up to 5,000 pounds before an overloaded car incurs a penalty. There is no such allowance in Item 200-B for a car that is "partially dirty." The Norfolk Southern overload tariff provides for a total waiver of overload charges under described conditions. Even the UP overload provisions contain tolerance waivers of up to 5,000 pounds for overloaded cars, in contrast with Item 200-B, which contains no tolerance provisions.

Counsel's Exhibit L is a potpourri of tariff provisions of various carriers, seemingly without relevance to Item 200-B.

VIII. CONCLUSION

The facts of record disclose only a de minimis number of incidents where residue on car exteriors were reported to have caused overspeed retarder or other safety problems. Although other such problems are claimed by UP to have been too small in dollar amount to require reporting to FRA, the number of those "too small" incidents plainly is in the possession of UP, but was not disclosed. Rather, UP prefers to rely on undocumented recitations of all the possible consequences of car exteriors with product residue, including claims of vast costs that are totally unquantified and left to the imagination.

The fact that UP relies on undocumented and unquantified costs of product residue on car exteriors must be viewed as a concession by UP that it will not calculate those costs even with respect to all "overspeed" incidents that have occurred, raising a reasonable inference that such costs are below the radar and that UP's claims of jeopardy from cars with exterior product residue are, at a minimum, simply alarmist. The facts of record demonstrating the minimal number of reported overspeed incidents and the unsupported allegations of UP suffice to meet any burden of proof that NAFCA may have to demonstrate the impropriety of UP's penalty tariff.

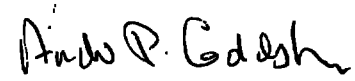
The unreasonable aspects of Item 200-B can be summarized as follows:

- There is no demonstrated need or basis for the penalties imposed by Item 200-B because shippers largely pursue safe loading practices.
- Item 200-B requires consignors to clean incoming empty cars of all existing product residue, even though the existence of such residue was not of their making but of a prior consignee's or of UP's failure to reject a "dirty" car back to the prior consignee.

- Item 200-B, which is a penalty provision, does not define the conditions under which consignors will be subject to the tariff's penalties, by failing to indicate how much product residue will be considered by UP to constitute the tender of an "unsafe" car.
- The last sentence of Item 200-B clashes with the well-established remedies at law available to shippers. Should UP be able to offer some degree of evidence of shipper responsibility for property damage, personal injury, or death resulting from product residue on the wheels of a car, the shipper should thereafter be allowed to offer proof of innocence or contributory negligence by UP or other parties. Item 200-B should not replace those remedies.
- The last sentence of Item 200-B may be construed by a court as exonerating UP from accepting a car into transportation that it should not have accepted, and as placing a legal obligation on a shipper that might be used by UP to argue that Item 200-B controls the standard of behavior required of a shipper in a civil suit involving claims for negligence.
- As UP admits, disputes involving relative degrees of negligence between shippers and carriers are to be expected and can be resolved in civil courts. It is unreasonable for UP to use a published tariff as a means of influencing the outcome of such civil disputes, as is obviously UP's intent in publishing Item 200-B.

For all of the foregoing reasons, NAFCA urges the Board to find that Item 200-B is unreasonable, to order UP to cancel its tariff publication thereof, and to take such other action as may appear just and reasonable.

Respectfully submitted,



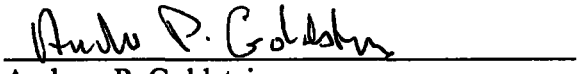
Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, N.W., Suite 700
Washington, DC 20006
(202) 775-5560

Attorneys for
North America Freight Car Association

Dated: March 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Public Version of Rebuttal Argument and Evidence of North America Freight Car Association has, this 5th day of March 2012 been served on counsel for defendant.



Andrew P. Goldstein

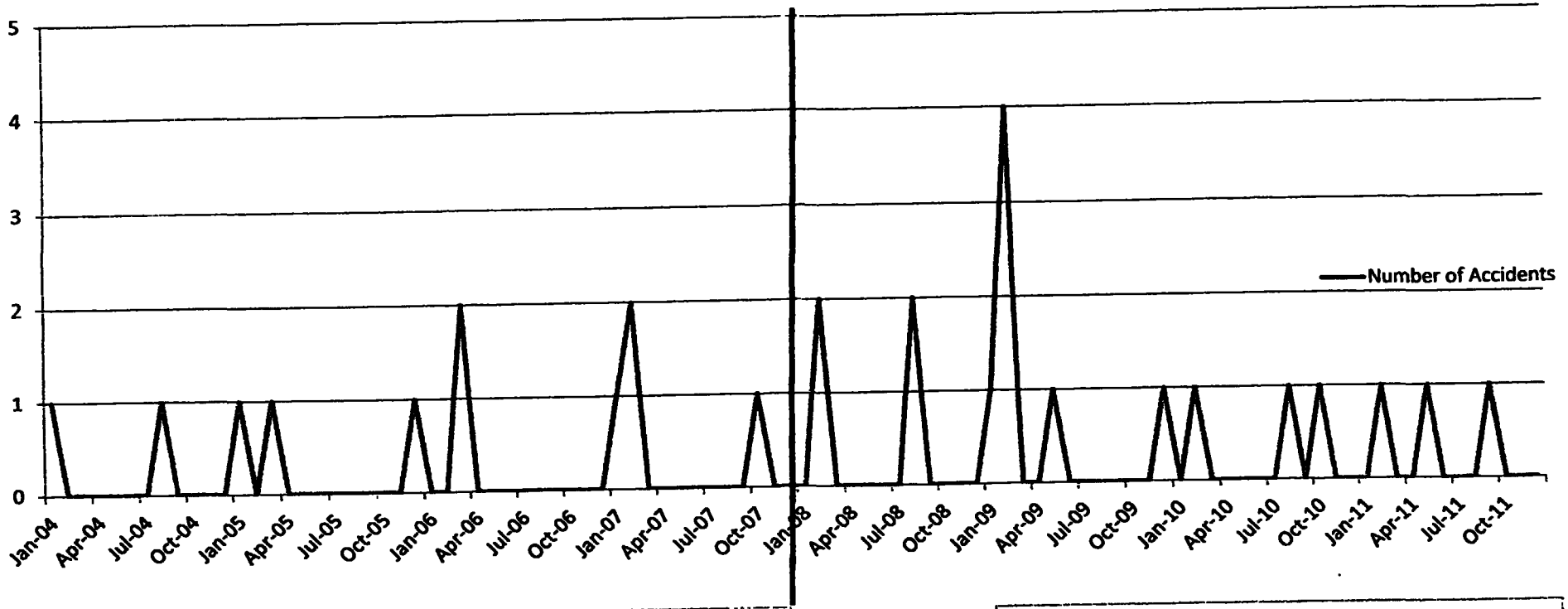
Date	Accidents	Date	Accidents
Jan-04	1	Jan-08	0
Feb-04	0	Feb-08	2
Mar-04	0	Mar-08	0
Apr-04	0	Apr-08	0
May-04	0	May-08	0
Jun-04	0	Jun-08	0
Jul-04	0	Jul-08	0
Aug-04	1	Aug-08	2
Sep-04	0	Sep-08	0
Oct-04	0	Oct-08	0
Nov-04	0	Nov-08	0
Dec-04	0	Dec-08	0
Jan-05	1	Jan-09	1
Feb-05	0	Feb-09	4
Mar-05	1	Mar-09	0
Apr-05	0	Apr-09	0
May-05	0	May-09	1
Jun-05	0	Jun-09	0
Jul-05	0	Jul-09	0
Aug-05	0	Aug-09	0
Sep-05	0	Sep-09	0
Oct-05	0	Oct-09	0
Nov-05	0	Nov-09	0
Dec-05	1	Dec-09	1
Jan-06	0	Jan-10	0
Feb-06	0	Feb-10	1
Mar-06	2	Mar-10	0
Apr-06	0	Apr-10	0
May-06	0	May-10	0
Jun-06	0	Jun-10	0
Jul-06	0	Jul-10	0
Aug-06	0	Aug-10	1
Sep-06	0	Sep-10	0
Oct-06	0	Oct-10	1
Nov-06	0	Nov-10	0
Dec-06	0	Dec-10	0
Jan-07	1	Jan-11	0
Feb-07	2	Feb-11	1
Mar-07	0	Mar-11	0
Apr-07	0	Apr-11	0
May-07	0	May-11	1
Jun-07	0	Jun-11	0
Jul-07	0	Jul-11	0
Aug-07	0	Aug-11	0
Sep-07	0	Sep-11	1
Oct-07	1	Oct-11	0
Nov-07	0	Nov-11	0
Dec-07	0	Dec-11	0
Total 2004-07	**11**	**Total 2008-11**	**17**

Source: Federal Railroad Administration, Office of Safety Analysis.

http://safetydata.fra.dot.gov/Officeof Safety/default.aspx.

Section 3.10 - Accident Causes.
Last retrieved February 10, 2012.

Number of Accidents Caused by Failure of Auto Hump Retarder to Slow Cars: 2004-2011



UP implemented its Tariff UP 6004-C, Item 200-B in January of 2008

Source: Federal Railroad Administration, Office of Safety Analysis.

http://safetydata.fra.dot.gov/OfficeofSafety/default.aspx. Section 3.10 - Accident Causes.
Last retrieved February 10, 2012.

Memorandum

U.S. Department
of Transportation

**Federal Railroad
Administration**

Date: FEB - 2 2009

Reply to Attn of: MP&E 09-01

Subject: Technical Bulletin MP&E 09-01, Informational Guidance Regarding the Calculation of Units and Proper Use of Activity Codes

From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators, Deputy Regional Administrators, MP&E Specialists, Chief Inspectors, Railroad Safety Oversight Managers, State Program Managers, and all Federal and State MP&E Inspectors

Effective immediately, inspectors will use the following instructions for preparing inspection reports regarding the calculation of units inspected. The Federal Railroad Administration's (FRA) Office of Railroad Safety recognizes that there may be instances when inspecting both sides of the train is not practical, due to safety considerations. Accordingly, the Office of Railroad Safety does not expect FRA inspectors to position themselves in a manner that places undue risk of injury or death in the performance of their duties. Given the public trust placed with FRA regarding its responsibility to monitor compliance with Federal regulations, the official policy with respect to this issue is that unless it is impracticable due to safety considerations, both sides of the car or locomotive should always be inspected, with an emphasis on the **quality** of units inspected above the quantity of units inspected.

Many FRA regulations require both sides of equipment to be inspected by railroad personnel during inspections/tests of rolling stock (see Title 49 Code of Federal Regulations §§ 215.13, 232.205, 232,207, 238.303, 238.313). Motive Power and Equipment (MP&E) inspectors should always be strategic when planning inspections. If the location where the rolling stock is standing makes it impractical to inspect the entire unit targeted for inspection, inspectors should exercise good judgment and consider an alternate location for inspection. FRA inspectors should not claim inspection unit credit for an activity when the entire unit has not been inspected. For example, when conducting Blue Signal compliance observations, FRA inspectors should observe that both ends of the protected track (excluding stub tracks) are in compliance with the regulations. The same logic applies to the inspection of a freight/passenger car or locomotive. The entire unit should be inspected, not just one side. In both of the above examples, inspectors should not report an inspection activity unit count on their inspection report unless the entire unit

has been inspected. *Exception: If an FRA inspector observes a defective condition on rolling stock on an adjacent track while engaged in an inspection on another track, this policy does not preclude inspectors from verbally reporting the defect to a railroad officer, or documenting the defect on an inspection report, if necessary.*

Railroading is an inherently dangerous industry and FRA inspectors should always be mindful of their surroundings. FRA inspectors are encouraged to review the General Compliance Manual, specifically the section titled, "Recommended Safe Work Practices for FRA Employees," Chapters 3 and 4. When working in teams or with railroad personnel, an appropriate job briefing should always precede any inspection activity. When inspecting alone, FRA inspectors should always be alert for unexpected movement of the equipment they are inspecting, as well as the movement of equipment on adjacent tracks.

This technical bulletin should not be interpreted to mean that inspectors are required to inspect the entire train in order to claim any inspection activity unit count. Inspectors are encouraged to continue to use discretion when conducting inspections. If an inspector decides to target a block or series of cars in a train for inspection, the inspector remains responsible for deciding how many units to inspect. But both sides of the equipment for each sampling should be inspected in order to be taken as a unit count. FRA inspectors are reminded that FRA is responsible for monitoring railroad compliance with Federal regulations. FRA is not responsible for conducting inspections on behalf of the railroad. Thus, it is imperative for inspectors to conduct a complete inspection of the unit targeted for inspection if it can be accomplished in a safe manner.

This technical bulletin will also serve to reiterate the proper use of activity codes available to MP&E inspectors by providing additional information for each code. See the table below for a complete and detailed description of activity codes available to MP&E inspectors.

Activity Code Table of Descriptions

Activity	Description for Use
209	**Remedial Action** - Each time an inspector reports "remedial action not reported" by a railroad, one unit is taken for each incident.
215	**Freight Car Inspection** - One unit is to be taken for each freight car inspected, provided the entire car (both sides) is inspected for compliance with Part 215. For articulated cars, each platform is counted as one unit.
217E	**Emergency Order Inspection** - One unit is to be taken whenever an inspection is conducted for compliance with an emergency order.
218M	**Blue Signal Protection on Main or Auxiliary Tracks** - An inspection conducted on any track that is not part of a locomotive servicing area or car shop facility, or has not been designated as a repair track, for compliance with blue signal protection. One unit is taken for each track that requires blue signal protection. However, if more than one train or cut of cars requiring protection is on the track, each counts as one unit. Each track inspected for compliance with blue signal regulations regarding remotely controlled switch and derails, combined with the recordkeeping requirements for that track, is counted as one unit. **Note: Excluding stub tracks, both ends of the track must be inspected for compliance with the regulations.**
218S	**Blue Signal Protection Locomotive or Car Shops** - Each inspection for compliance with regulations requiring blue signal protection in a locomotive servicing track area or a car shop repair track area, or on a track that has been designated as a repair track or expedite track, is counted as one unit. If § 218.29(c), *Alternative methods of protection*, is being applied in a car shop repair track area or a locomotive servicing track area, one unit is counted for the entire area, regardless of the number of tracks in the area or the number of cars or locomotives on those tracks. **Note: Excluding stub tracks, both ends of the track or area must be inspected for compliance with the regulations.**
218U	**Utility Employee Provisions** - Each inspection for compliance with the utility employee rule provisions is counted as one unit.
218T	**Tampering** - Each locomotive "in service" that is inspected for tampering with safety devices is counted as one unit.
221	**Rear End Markers** - Each train, locomotive, or caboose inspected for compliance with the rear end marking device is one unit. Each inspection of rooms or locations where rear end marking devices are stored and/or recharged and maintained prior to being placed into service is one unit. Multiple rooms or locations within the same yard or facility are counted as one unit. Individual marking devices that are not attached to trains are not unit counts.

REBUTTAL VERIFIED STATEMENT

OF

JOHN MARTIN

My name is John Martin. I am employed by Archer Daniels Midland Company as Director of its Rail Fleet. I have been employed by ADM for 23 years and have held my present position since May 2006. In addition to my 23 years with ADM, I have 10 prior years' experience working with rail car repairs in contract repair shops.

I am aware that safety devices on rail cars, such as hand grips and brake wheels, may at times attract oils or other slippery liquid substances that could make it difficult for a person to secure a firm grip on those appliances. However, it is the consistent practice at ADM for persons working on and around railcars to wear heavy-duty work gloves that allow them to securely grip safety appliances even if the appliances have an oily or greasy coating. Based on my years of experience in working with rail cars, and attending conferences and meeting with my peers who work for other shippers, it is my understanding that the use of work gloves is a practice followed by employees who work on rail cars for most shippers.

I offer one further observation. Tank cars, whether they leave our facilities as single car shipments or as part of a larger unit, always move in larger trains that have up to 100 cars. That is true of tank cars shipped by ADM and others. Should one of those tank cars be leaking as it moves through a railroad yard, the trailing cars, no matter what their type, may well accumulate the leaked product on their wheels as the train moves through the area where the leakage occurred, and before the carrier is made aware of the leakage and takes remedial steps.

VERIFICATION

John Martin, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

John Martin

Subscribed and sworn to before me this 22nd day of February, 2012.

"OFFICIAL SEAL"
REBECCA A VOIGT
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 06/07/2013

Notary Public

My commission expires 6/7/2013.

REBUTTAL VERIFIED STATEMENT

OF

DARRELL R. WALLACE

My name is Darrell R. Wallace. I am employed as Vice President, Transportation, for Bunge North America, Inc. I am the same Darrell R. Wallace that submitted a Verified Statement as part of NAFCA's opening comments.

The main purpose of this Rebuttal Statement is to point out that cars traversing UP, especially if not in unit trains, generally move in more than one train from origin to destination and thus provide an opportunity, if not an obligation, for inspection by UP each time the car is placed in a new train.

Attached as Exhibit 4-A is a car movement tracing report obtained by Bunge from UP's ordinary, available records. _____

_____

_____

_____

_____

_____

_____

_____

____. At each such stop, the car could have been inspected by UP for wheel contamination, as it

should have been each time the car was placed in a new train, and certainly when it was placed in a road train.

_____. It was exposed to normal track debris enroute and possibly to UP track oilers that automatically dispense oil on tracks to reduce wheel friction at certain track curvatures.

Aside from the fact that the ultimate destination of this car was in California, it is typical of cars moving on UP over long distances, where there are train changes and substantial layovers that can require or allow an opportunity for UP to inspect wheels or other car parts for leakage.

I would also like to mention one additional item, in response to UP's suggestions that unclean safety appliances pose a hazard for employees of shippers and that Item 200-B looks out for the interests of shipper employees by requiring clean safety appliances.
Bunge, and to the best of my knowledge other large grain and oil processors, does not permit its employees to ascend to the top of a car, or to a platform near the top of a car which is sometime used by employees who are loading cars from the top in lieu of the metal catwalks that are on the cars themselves, unless they wear "fall protection," which is essentially a harness tethered to a safety pole, and designed to protect against an employee slipping and falling to the ground.

VERIFICATION

Darrell R. Wallace, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

Darrell R. Wallace

Subscribed and sworn to before me this 15th day of March, 2012.

Notary Public

My commission expires 4/9/2012.

" NOTARY SEAL "
Phyllis Stracke, Notary Public
St. Louis County, State of Missouri
My Commission Expires 4/9/2012
Commission Number 08414130

ENTIRE PAGE REDACTED

ENTIRE PAGE REDACTED

ENTIRE PAGE REDACTED

REBUTTAL VERIFIED STATEMENT

OF

RICK GROSSMAN

My name is Rick Grossman. I am Vice President – Equipment for First Union Rail ("FUR"), a Wells Fargo Company. I am the same Rick Grossman who supplied a Verified Statement for NAFCA's opening filing in this proceeding.

I wish to focus this statement on the job classification of railroad "carman."

A carman is an employee specially trained to inspect cars for non-compliance with the FRA's freight car standards and to perform required repairs to freight cars. Carmen are the employees who are "Designated Inspectors" under 49 C.F.R. § 215.11, reading:

> (a) Each railroad that operates railroad freight cars to which this part applies shall designate persons qualified to inspect railroad freight cars for compliance with this part....
>
> (b) Each person designated under this section shall have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the requirements of this part....

FRA regulations at 49 C.F.R. 215.13 provide for pre-departure inspections of freight cars. Subsection (c) states that "at a location where a person designated under § 215.11 is not on duty for the purpose of inspecting freight cars, the inspection required by paragraph 1(a) shall, as a minimum, be made for those conditions set forth in appendix d to this part."

As a practical matter, where a Designated Inspector is not available, the required pre-departure inspection is made by the train's conductor or other train crew member. However, conductors and train crew members have other duties, and are not normally qualified as specialized "Designated Inspectors," or Carmen.

For a number of years now, the quantity of carmen working for the railroad industry, which includes UP, has declined. To the best of my knowledge regarding operations on the UP, whereas carmen years ago were often positioned at stations where large trains were made up, today they are mainly confined to classification yards and other large yard facilities.

VERIFICATION

Rick Grossman, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

Rick Grossman

Subscribed and sworn to before me this 27th day of February, 2012.

Notary Public

My commission expires 8-14-2012.

OFFICIAL SEAL
SUSAN GROKULSKY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8-14-2012